



preliminary hearing Order directing respondent to pay “all bills from Via Christi Environmental Medicine, Dr. Sutherland and Midwest Hearing for hearing aids provided to Claimant.”<sup>3</sup> No Board review of that Order was requested. The ALJ incorporated her prior finding regarding the hearing aids into the December 12, 2011, Award as corrected by the December 15, 2011, Nunc Pro Tunc Award.

The Board has considered the record and adopted the stipulations listed in the Award and the Nunc Pro Tunc Award.

### **ISSUES**

The parties stipulated to the compensability of the claim for bilateral hearing loss with a date of accident of January 20, 2011. The parties also stipulated to the ALJ’s award of permanent partial disability benefits. The only issue on appeal is whether respondent must reimburse claimant for the cost of hearing aids claimant purchased on or about January 31, 2011, as authorized medical.

Respondent does not dispute the amount of the bill or that hearing aids were reasonably necessary to cure or relieve the effects of claimant’s injury. However, respondent asks the Board to reverse the Award, arguing that respondent did not authorize the purchase of the hearing aids, that respondent did not neglect to reasonably provide claimant with the services of a health care provider, and that there was no medical emergency which justified claimant’s decision to purchase the hearing aids without first obtaining authorization from respondent or its workers compensation carrier.

Claimant argues the ALJ’s Order should be affirmed.

The issue for the Board’s consideration is, accordingly, whether the ALJ erred in ordering respondent to reimburse claimant \$8,000 for his purchase of hearing aids on or about January 31, 2011.

### **FINDINGS OF FACT**

Claimant worked for respondent as a journeyman pressman for 42 years. During that period he worked in the press room, where he was exposed to loud noises. Over time, claimant developed hearing loss. Claimant testified at the preliminary hearing that about eight years earlier he had, on his own, purchased hearing aids. The hearing aids helped at first but, as claimant continued to work, his hearing worsened and his original hearing aids became ineffective.

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<sup>3</sup> ALJ Order (May 19, 2011) at 1.

On January 31, 2011, claimant's last day of employment with respondent,<sup>4</sup> he notified Kara<sup>5</sup> Hunt, respondent's Human Resources Director, about his hearing loss and his desire to claim workers compensation benefits. Ms. Hunt had claimant fill out an accident report and sent him to respondent's workers compensation physician, Dr. Daniel Lygrisse. Claimant saw Dr. Lygrisse at 4:10 p.m. the same day. His hearing was tested, and Dr. Lygrisse found that claimant had bilateral hearing loss; that he needed hearing aids; and that if he continued to work, he would need hearing protection. Dr. Lygrisse told claimant he believed claimant's condition was work related.

After claimant saw Dr. Lygrisse, he returned to respondent and again spoke with Ms. Hunt. He provided her with a document entitled "Authorization for Medical Treatment or Exam." The document was signed by Dr. Lygrisse and indicated that claimant sustained bilateral hearing loss, that the hearing loss was work related, and that claimant needed hearing aids. Claimant asked Ms. Hunt if respondent would provide him with hearing aids. Ms. Hunt told him respondent would not provide the hearing aids and that he would have to file a workers compensation claim and go through the workers compensation carrier, Travelers. Ms. Hunt told claimant she would contact respondent's workers compensation carrier about his claim. Ms. Hunt did not tell claimant to wait until he heard back from the workers compensation carrier before obtaining the hearing aids. Claimant asked Ms. Hunt about securing partial payment for the hearing aids through his health insurance coverage. Ms. Hunt responded that his health insurance coverage through respondent would expire at midnight on January 31, 2011. Ms. Hunt then explained to claimant about how COBRA worked.

After claimant's discussion with Ms. Hunt, he left respondent and went straight to Midwest. He ordered two hearing aids at a cost of \$8,000, which claimant paid for himself via credit card.<sup>6</sup> Midwest submitted a claim for the hearing aids to claimant's health insurance carrier, but the claim was denied because claimant did not proceed through his primary care physician.

Ms. Hunt did not tell claimant to purchase the hearing aids. No one from respondent or its workers compensation carrier authorized claimant to purchase the hearing aids.

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<sup>4</sup> Claimant had accepted a severance package offered by respondent.

<sup>5</sup> Respondent's counsel advised that Ms. Hunt's first name is Kara, not Karen, as indicated in the transcript of preliminary hearing. Respondent's Brief at 3 (filed January 27, 2012).

<sup>6</sup> On January 31, claimant only ordered the hearing aids. He actually paid for the aids when they arrived at Midwest on February 2, 2011.

**PRINCIPLES OF LAW**

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 2010 Supp. 44-510h states in part:

(a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

. . . . .

(b)(2) Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of \$500. The amount allowed for such examination, diagnosis or treatment shall not be used to obtain a functional impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.

K.S.A. 44-510j(2)(h) (Furse 2000) states in part:

If the employer has knowledge of the injury and refuses or neglects to reasonably provide the services of a health care provider required by this act, the employee may provide the same for such employee, and the employer shall be liable for such expenses subject to the regulations adopted by the director.

**ANALYSIS**

Respondent argues the ALJ erred in ordering it to reimburse claimant for his \$8,000 purchase of hearing aids on or about January 31, 2011, because claimant was not authorized by respondent or its workers compensation carrier to make that purchase. The Board agrees and reverses the ALJ's award to the extent that it requires respondent to pay for the hearing aids beyond the \$500 maximum for unauthorized medical expense.

Respondent has the obligation under K.S.A. 2010 Supp. 44-510h(a) to provide a health care provider and such medical treatment as may be necessary to cure and relieve the employee from the effects of the injury. Along with its obligation, respondent has a corresponding right to designate the provider from whom the medical care is to be provided.<sup>7</sup>

Respondent did not refuse or neglect to reasonably provide the services of a health care provider, nor did it fail to provide reasonable and necessary treatment. On the contrary, respondent promptly appointed an authorized physician on the same day it first received notice that claimant was claiming a work-related hearing loss. Respondent did not withdraw authorization of Dr. Lygrisse. Claimant was not free under K.S.A. 44-510j(2)(h) to seek his own medical treatment at respondent's expense.

Claimant acted prematurely when he immediately purchased the hearing aids on the very day he notified respondent of his claim. Claimant knew before the purchase that respondent would not provide the hearing aids at its own expense. Claimant knew that if he was going to seek payment for the hearing aids through respondent's workers compensation coverage, he would have to file a claim and then seek authorization from the carrier. Claimant knew he did not have approval from the respondent or the carrier to provide the hearing aids for himself as authorized treatment.

Before he purchased the hearing aids, claimant also knew that the carrier had not yet been put on notice of the claim. Claimant could not have reasonably expected that the carrier could be notified of the claim before the purchase when claimant did not see Dr. Lygrisse until after 4 p.m. on January 31, 2011. Ms. Hunt told claimant that she would contact the carrier about the claim, but there is no evidence that such notification was refused or delayed. There is no evidence that there was an emergency which required the immediate purchase of the hearing aids and which may have justified claimant in rapidly seeking treatment without authorization.

### **CONCLUSION**

The Board finds claimant's purchase of hearing aids on or about January 31, 2011, was unauthorized and that respondent is not liable to pay the cost thereof beyond the \$500 maximum. The Award must accordingly be reversed to the extent that it holds respondent liable to pay for the hearing aids.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that Administrative Law Judge Nelsonna Potts Barnes' Award dated December 12, 2011, and Nunc Pro Tunc

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<sup>7</sup> See *Matney v. Matney Chiropractic Clinic*, 268 Kan. 336, 340, 995 P.2d 871 (2000).

Award dated December 15, 2011, are reversed to provide that respondent is not obligated to pay for the hearing aids purchased by claimant as authorized medical expense. The Award is otherwise affirmed .

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of April, 2012.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: David H. Farris, Attorney for Claimant  
dfarris@hzflaw.com  
lhathaway@hzflaw.com

Lyndon W. Vix, Attorney for Respondent and its Insurance Carrier  
lvix@fleeson.com

Nelsonna Potts Barnes, Administrative Law Judge